Tentative Rulings for May 1, 2019
Departments 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

16CECG02149 ***Williams v. FCA US, LLC*** **both motions are continued to Thursday, May 2, 2019 at 3:30 p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

(24) **Tentative Ruling**

Re: ***PenberaParis, LLC v. Spirit of California, Inc.***
Court Case No. 18CECG02904

Hearing Date: May 1, 2019 (Dept. 403)

Motion: Default Prove-Up

Tentative Ruling:

To deny without prejudice.

Explanation:

Technical Problems

- No Request for Court Judgment filed

The Judicial Council CIV-100 form "Request for Court Judgment" is required with each prove-up hearing, and was particularly necessary here as what plaintiff is requesting has changed considerably from what was requested at the last prove-up hearing.

- Still no dismissal of Material Works, Inc.

Default judgment is once again requested only as to defaulted defendants Spirit of California, Philip L. McKitterick, and James B. Rogers. Defendant Material Works, Inc. (the only other remaining defendant) has still not been dismissed, nor has it been defaulted; it is not even clear this defendant has been served yet. Pursuant to CCP §579, judgment as to less than all of the named defendants is only proper where the court, in its discretion, determines it is appropriate. Also, California Rules of Court, Rule 3.1800, subdivision (7), requires the plaintiff to include, with any request for default judgment, a "dismissal of all parties against whom judgment is not sought or an application for separate judgment against specified parties under Code of Civil Procedure section 579, supported by a showing of grounds for each judgment." Plaintiff has not shown why a separate judgment would be appropriate here.

Thus, unless plaintiffs dismiss defendant Material Works, Inc., no default judgment against the three defaulted defendants can be entered.

Consideration of Merits

On the assumption that the two technical issues mentioned above can easily be cured at or before the time of the hearing, the court has considered the request for judgment on its merits. The court is required to render default judgment only for that relief as appears by the evidence to be just. (Code Civ. Proc., § 585, subd. (b).) Even

though plaintiffs failed to file the Request for Default Judgment form, the current memorandum of points and authorities indicates plaintiffs are seeking a judgment of $270,000 under their breach of contract cause of action, or alternatively, under their elder abuse cause of action. And as to the elder abuse cause of action, plaintiffs seek the attorney fees allowed for financial elder abuse, which they say should be in the total amount of $92,500.

- "Hard Costs" as to "Entity Filing Fees"

Plaintiff now also requests "hard costs" incurred which relate to "entity filing fees for the SOC project" in the amount of $1,714.80; this was not requested at the last hearing. What exactly these costs are is not stated. Dr. Penbera merely states in his declaration that he has "incurred…hard costs relating to SPIRIT OF CALIFORNIA entity filing fees in the amount of $1,714.80." (Penbera Decl., ¶ 18, p. 6:8-10.) More explanation is needed as to what this was for, and if sufficient proof is provided, this amount may be considered part of plaintiffs' damages in addition to the $270,000 requested, for a total principal judgment in the amount of $271,714.80.

- Breach of Contract Cause of Action

The breach claim attempts to hold all defendants liable under it. However, as was fully discussed in the Tentative Ruling adopted on February 14, 2019, defendants Rogers and McKitterick signed the contract only in their representative capacities, on behalf of defendant Spirit of California, Inc., and only defendants Spirit of California, Inc. and Rogers (by virtue of his signature on the Addendum), could be held liable on a judgment pursuant to the breach of contract claim.

- Elder Abuse Claim

The court's earlier ruling found that the threshold issue with this claim was whether the elder abuse statute, specifically Welfare and Institutions ("W&I") Code section 15610.30 applies in this situation. This statute allows for damages where the plaintiff elder has been harmed when a defendant "[t]akes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult[.]" Subdivision (c) of section 15610.30 further provides that this occurs, for purposes of the statute, when the elder is "deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult."

Plaintiffs contend that defendants' refusal to pay Dr. Penbera the $270,000 he is owed under the contract constitutes a "taking" of his personal property. In its earlier ruling, the court found that although it was clear Dr. Penbera has a *contractual right to be paid,* it does not necessarily follow that this can be deemed a *property right*, since generally, appellate cases dealing with elder abuse claims are situations where *tangible property* such as the elder's money, investments, or real or personal property have been taken. It was not at all clear this constituted a taking envisioned under the elder abuse law, especially with no authority for this.

Plaintiffs now provide some authority, although it is neither binding nor persuasive. The two cases cited—*Rosove v. Continental Cas. Co.* (C.D. Cal., June 2, 2014, No. 2:14-CV-01118-CAS) 2014 WL 2766161 ("*Rosove*") and *Johnston v. Allstate Ins. Co.* (S.D. Cal., May 23, 2013, No. 13-CV-574-MMA BLM) 2013 WL 2285361 ("*Johnston*")—are both unpublished federal district court cases. In each case, the opinion was a ruling on defendants' motion for dismissal, the equivalent of demurrer, and thus they were testing the pleadings and each case found that the pleadings were sufficient to withstand dismissal.

Both cases involved elder plaintiffs who sued their insurer for bad faith denial of coverage. In each case, plaintiff alleged that the defendant insurer's failure to pay benefits under the insurance contract—i.e., benefits to which each plaintiff claimed they were legally entitled—constituted a "taking" of their "personal property" within the meaning of the financial elder abuse statute, W&I section 15610.30. Thus, each case was considering the discrete issue of whether monies due under a homeowner's insurance policy are "personal property," such that a bad faith denial of coverage constituted financial elder abuse. (*Johnston* at *2; *Rosove* at *4.) The court in *Johnston* expressly noted that this "appears to be an issue of first impression in federal and California courts." (*Johnston* at *2.)

At least one California appellate court, in a very recent case (January 2019), has cited both of these cases for the proposition that "[a]n insurer's bad faith denial of a claim can support a cause of action for financial elder abuse." (*Strawn v. Morris, Polich & Purdy, LLP* (2019) 30 Cal.App.5th 1087, 1102 [but finding this claim subject to demurrer as stated against the attorney for the insurer].) This at least would support a California state trial court finding that an elder abuse claim was applicable *in the context of an insurer's bad faith denial.* But it fails to provide support for extending this to a non-insurance context, i.e., to a breach of a contract for professional services, between private parties.

And there are important distinctions between the insurance context and this. For one thing, the insurer has much more control over both the terms of the contract, and coverage under that contract, than does a defendant simply contracting for services, as in the case at bench. Clearly, the fact that an insurance contract is by definition one of adhesion (or one with highly adhesive elements) is at least one reason the insurance industry is highly regulated. Such is not the case where two parties with equal bargaining power are contracting, as in this case.[1] Furthermore, the purpose and aim of

[1] Here, it must be assumed that both sides to this contract were in an equal bargaining position. In fact, the complaint stresses that Dr. Penbera is a member of the National Association of Forensic Economists, a former Senior Fulbright Scholar in Economics, and a former university dean, who has worked for many organizations both here and abroad, and that the services he and his LLC provide are highly specialized. He might even have been in the stronger bargaining position at the time of contracting. He was not *forced* to accept a contract providing for payment in shares of stock instead of cash, but rather it appears he was simply lured by the (risky) upside potential for the per share price to increase dramatically, as held out by the defendants. He was not *forced* to continue providing services when defendants failed to complete the financial questionnaire to establish their stability, and when they continually failed to follow through with their obligations as plaintiffs reached the various benchmarks set in the contract.

contracting for insurance is extremely different than other contracts (i.e., such as a service contract, in the case at bench). In the insurance context, the insured is contracting for coverage in the event of a loss, quite often a devastating loss, such that it can be readily anticipated that bad faith on the insurer's part could have even more devastating effects on the insured. This is far different from the context of a contract for professional services.

In short, while there appear to be important policy reasons to allow an elder abuse claim to be stated in the context of an insurance bad faith denial of coverage, as illustrated in *Rosove* and *Johnson,* and as recognized in *Strawn,* it is not at all clear that a state appellate court would extend this to other types of contracts. Certainly, plaintiff did not point the court to a case where there actually has been such an extension. There being no binding or persuasive authority cited, it does not appear appropriate to find that Dr. Penbera's contractual right to be paid *under a non-insurance service contract* constituted "personal property" within the meaning of an elder abuse claim under W&I section 15610.30.

Furthermore, even if judgment was issued under this claim, it would not support granting the amount of attorney fees requested here. Plaintiffs ask for attorney fees in the total amount of $92,500, based on provisions in plaintiffs' attorney-client fee agreement, which provided for an up-front flat fee of $25,000 to be paid, plus an additional 25% contingency fee, which based on a judgment amount of $270,000 would be $67,500. However, the fee agreement has no relevance in setting the attorney fees on this default judgment.

The Elder Abuse statutes provide that if it is proven that defendant is liable for "financial abuse" under W&I Code section 15610.30, then in addition to other remedies, the court "shall" award plaintiff <u>*reasonable*</u> attorney fees and costs. (W&I Code, § 15657.5, subd. (a).) Such statutory attorney fees are recoverable as court costs "upon entry of default judgment." (Code Civ. Proc., § 1033.5, subd. (c)(5)(iv).) This means the fees requested must be shown in the Request for Court Judgment (CIV-100) form. (*Garcia v. Politis* (2011) 192 Cal.App.4th 1474, 1479 [party seeking default judgment must apply for all relief sought, including attorney fees and costs, in the application for entry of default and not by post-judgment motion].)

The appropriate amount of reasonable fees is ordinarily determined by the court pursuant to the "lodestar" method, which is calculated from a compilation of time *reasonably spent* and *reasonable hourly compensation* of the attorney, with this base then subject to adjustment in light of various factors. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48 [141 Cal.Rptr. 315, 327; *Serrano v. Unruh* (1982) 32 Cal.3d 621, 639.) The lodestar method vests the court with discretion to decide which of the hours expended by the attorney were "reasonably spent" on the litigation. (*Hammond v. Agran* (2002) 99 Cal.App.4th 115, 132, *disapproved on other grounds by Conservatorship of Whitley* (2010) 50 Cal.4th 1206.) This method of determining "reasonable" fees applies to attorneys who are (*inter alia*) retained on a contingency fee basis. (*Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1260.) Thus, consideration of what plaintiff agreed to pay in the fee agreement is not germane to consideration of fixing attorney fees under a statute. Moreover, it does not appear that the fees sought bear any reasonable relation to the hours reasonably spent by counsel on this litigation, given there was literally no

"litigation" involved here, as no defendant appeared. Even if the court were to allow a judgment under this claim, attorney fees could only be awarded pursuant to the lodestar method, based on counsel's submission of evidence as to his claim of *time reasonably spent* and *reasonable hourly rate*, and not according to any provision in plaintiffs' attorney-client fee contract.

Summary

The two technical issues—filing a Request for Default (CIV-100) form, and dismissal of defendant Material Works, Inc.—must be addressed or the request for default judgment must be denied.

If those issues are addressed, then plaintiffs must prove up the "hard costs" consisting of "entity filing fees," and if sufficiently proven these can be considered part of plaintiffs' damages. But a default judgment on the breach cause of action could only issue as to defendants Rogers and Spirit of California, Inc., and not as to defendant McKitterick. Further, it does not appear that plaintiffs can obtain judgment under their elder abuse cause of action, as the authority presented on this motion only supports extending such liability in the context of insurance bad faith denial of coverage. Finally, pursuant to the information provided in the court's ruling issued on February 14, 2019, plaintiffs may obtain a judgment against all three defaulted defendants on the fraud claim, but no attorney fees could be awarded under this claim.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: **RTM** (Judge's initials) **on** **4/29/19** (Date) .

(17) **Tentative Ruling**

Re: ***Sanchez v. Vang, et al.***
Court Case No. 18CECG04143

Hearing Date: May 1, 2019 (Dept. 403)

Motions: Motion to Recover Service Costs [CCP § 415.30, subd. (d)]
Motion to Compel Initial Responses to Form Interrogatories, Set One

Tentative Ruling:

To grant the motion to recover service costs in the amount of $114.50.

To grant the motion to compel. Defendant Pether Robert Thao Chay shall provide verified responses to plaintiff's Form Interrogatories, Set One, within 10 days of the clerk's service of this minute order. Defendant Pether Robert Thao Chay shall pay the sum of $475.60 to Accident, Injury and Medical Malpractice Attorneys of California, APC within 30 days of the clerk's service of this minute order.

Explanation:

Motion for Costs:

Code of Civil Procedure section 415.30, subdivision (d) provides: "If the person to whom a copy of the summons and of the complaint are mailed pursuant to this section fails to complete and return the acknowledgment form set forth in subdivision (b) within 20 days from the date of such mailing, the party to whom the summons was mailed shall be liable for reasonable expenses thereafter incurred in serving or attempting to serve the party by another method permitted by this chapter, and, except for good cause shown, the court in which the action is pending, upon motion, with or without notice, shall award the party such expenses whether or not he is otherwise entitled to recover his costs in the action."

Plaintiff seeks $174.50, which includes the skip trace fee and the service of process fee of $114.50, this motion's filing fee of $60.00, and this motion's mailing cost of $1.42. However, only the $114.50 cost of substitute service, and not the costs of the motion may be awarded under the plain language of section 415.30, subdivision (d).

Motion to Compel Initial Responses:

Unverified responses are tantamount to no responses at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.) Code of Civil Procedure section 2015.5, which describes the requirements for a verification in California, calls for such verification to be dated and signed. As such the verification at issue is defective. The court should order defendant Pether to provide properly verified responses.

Code of Civil Procedure section 2030.290, subdivision (c) provides, in relevant part: "The court shall impose a monetary sanction under Chapter 7 (commencing with

Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Section 2023.030, subdivision (a) provides, in relevant part: "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." Section 2030.010 states: "[m]issuses of the discovery process include, but are not limited to, the following: [¶] [¶] [¶] d) Failing to respond or to submit to an authorized method of discovery." California Rule of Court 3.1348(a) provides that monetary sanctions may be awarded under the Discovery Act in favor of a party who files a motion to compel discovery even if "the requested discovery was provided to the moving party after the motion was filed."

To avoid sanctions on a motion to compel, the burden is on the losing party to prove justification or circumstances that establish sanctions would be unjust. (*Mattco Forge, Inc. v. Arthur Young & Co*. (1990) 223 Cal.App.3d 1429, 1441.) Defense counsel has provided an explanation for the late discovery, but not the defective verification. Sanctions of $475.60 will be awarded.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: RTM on 4/29/19 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(24) **Tentative Ruling**

Re: ***Hawkins v. United Services Automobile Association***
Court Case No. 17CECG03468

Hearing Date: ***If oral argument is timely requested on April 30th between the hours of 3:00 – 4:00 p.m., it will be held on Thursday*** May 2, 2019 @ 3:00 p.m. (Dept. 501)

Motion: Application of Thomas E. Sanders to Appear *Pro Hac Vice* on Behalf of Defendant United Services Automobile Association

Tentative Ruling:

To grant. The applicant has satisfied the requirements of California Rules of Court, Rule 9.40. The court will sign the order provided.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 4/29/19 .
(Judge's initials) (Date)

(2) **Tentative Ruling**

Re: ***Miller v. Murphy***
Superior Court Case No. 187CECG01096

Hearing Date: ***If oral argument is timely requested on April 30th between the hours of 3:00 – 4:00 p.m., it will be held on Thursday*** May 2, 2019 @ 3:00 p.m. (Dept. 501)

Motion: Defendant/cross-complainant's motion to enforce the settlement

Tentative Ruling:

To grant defendant/cross-complainant's motion to enforce the settlement. Code of Civil Procedure section 664.6. The Court dismisses the complaint and the cross-complaint without prejudice.

Explanation:

The evidence before the Court shows a written settlement agreement between the parties. If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. Code of Civil Procedure section 664.6.

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 4/29/19.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Ruschhaupt v. Marocopa Orchards, LLC***
Superior Court Case No. 18CECG01545

Hearing Date: ***If oral argument is timely requested on April 30th between the hours of 3:00 – 4:00 p.m., it will be held on Thursday*** May 2, 2019 @ 3:00 p.m. (Dept. 501)

Motion: Defendant's Petition to Compel Arbitration

Tentative Ruling:

To grant order plaintiff's individual claims to arbitration (all causes of action). To sever the PAGA claims as pled in the second, third, fifth, seventh, eighth, and ninth causes of action, and stay litigation thereof until after arbitration is completed.

Explanation:

When a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine: (1) whether the agreement exists and, (2) if any defense to its enforcement is raised, whether it is enforceable. The petitioner (seeking to compel arbitration) bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence. The party claiming a defense bears the same burden as to the defense. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-414.)

It is undisputed that plaintiff entered into an agreement to arbitrate the claims raised in the complaint. Plaintiff does not argue that the agreement is unconscionable in any way. Rather, plaintiff opposes the petition to compel arbitration on two grounds: (1) plaintiff cannot be required to arbitrate the PAGA claims; and (2) defendant waived the right to compel arbitration by failing to plead the right to arbitration as an affirmative defense, conducting discovery in this proceeding, and by unreasonably delaying in filing the Petition.

PAGA claims

As to some of the claims plaintiff sues as a Private Attorney General. The second, third, fifth, seventh, eighth, and ninth causes of action, after setting forth plaintiff's individual claims, include the allegation that "[t]his cause of action is also being brought pursuant to California's Private Attorney General's Act (Lab. Code, 2699, et seq.)." (Complaint ¶¶ 57, 66, 82, 95, 100, 105.)

Under the Private Attorneys General Act ("PAGA"), an aggrieved employee may bring a civil action personally and on behalf of current or former employees to recover civil penalties for violations of the Labor Code. (Lab. Code § 2698, et seq.)

A PAGA claim cannot be ordered to arbitration without the consent of the state. (*Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 677.) Recognizing the principals established by the California Supreme Court in *Iskanian v. CLS Tramp. Los Angeles, LLC* (2014) 59 Cal.4th 348, the court in *Tanguilig* held that "...a PAGA plaintiffs request for civil penalties on behalf of himself or herself is not subject to arbitration under a private arbitration agreement between the plaintiff and his or her employer. This is because the real party in interest in a PAGA suit, the state, has not agreed to arbitrate the claim." (*Tanguilig*, *supra*, 5 Cal.App.5th at p. 677.)

PAGA provides a mechanism for "aggrieved employees" to act on behalf of the state to recover civil penalties from an employer for Labor Code Violations. (Lab. Code, § 2699.) An "aggrieved employee" is an employee who has been subject to Violations of the Labor Code. (Lab. Code, § 2699(c); see *Kim v. Reins Intemat. California, Inc.* (2017) 18 Cal.App.5th 1052, 1057.)

Plaintiff correctly points out that a plaintiff bringing a PAGA claim "… cannot be compelled to submit any portion of his representative PAGA claim to arbitration, including whether he was an 'aggrieved employee." (*Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 649; *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 422.)

However, in the cases relied upon by plaintiff, the plaintiff refusing to arbitrate PAGA claims asserted only PAGA claims; the plaintiff did not also assert individual claims for Labor Code violations like plaintiff in this case. (See *Williams, supra,* 237 Cal.App.4th at pp. 645-646 [plaintiff "brought a single cause of action" under PAGA, and had asserted no "individual claims" or class claims."]; *Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 174 [action "did not involve individual claims."].)

In this case plaintiff essentially pleads 16 causes of action, since for six of them, they are pled as individual causes of action, that are "<u>also</u> being brought pursuant to [PAGA] …" Accordingly, plaintiff's individual claims should be submitted to arbitration pursuant to the parties' agreement. The PAGA claims should be stayed pending completion of arbitration of plaintiff's individual claims (second, third, fifth, seventh, eighth, and ninth causes of action). (See *Franco v. Arakelian Enterprises, Inc.* (2015)234 Cal.App.4th947, 952, 966 [ordering arbitration of individual claims, and stay of PAGA claims pending completion of arbitration].)

Waiver

Plaintiff contends that defendant waived the right to compel arbitration by failing to plead the right to arbitration as an affirmative defense, conducting discovery in this proceeding, and by unreasonably delaying in filing the petition to compel.

Participating in litigation of an arbitrable claim does not itself waive a party's right later to seek arbitration. (*Saint Agnes Med. Ctr. v. PacifiCare of Calif.* (2003) 31 Cal.4th 1187, 1203.) But at some stage, litigation of the issues in dispute justifies a finding of waiver. While there is no single test for establishing waiver, the relevant factors include:

• "whether the party's actions are inconsistent with the right to arbitrate";
• "whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate";
• "whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay";
• "whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings";
• "whether important intervening steps (e.g., taking advantage of judicial discovery procedures not available in arbitration) had taken place"; and
• "whether the delay affected, misled, or prejudiced the opposing party."
(*Id.* at p. 1196 (internal quoted omitted).)

Little information is given by plaintiff as to the relevant considerations. According to plaintiff's counsel's declaration, the Complaint was served on 8/16/18. (Vasquez Dec. ¶ 2.) Defendant answered the complaint on 8/24/19, and "propounded four sets of discovery on the same day." (Vasquez Dec. ¶ 3.) However, no further information about this discovery is provided. Plaintiff's responses were served on 10/5/18. (Vasquez Dec. ¶ 5.) Plaintiff has not yet conducted any discovery. (Vasquez Dec. ¶ 6.) The answer did not include any affirmative defenses claiming a right to arbitrate. (Vasquez Dec. ¶ 4.) The motion to compel was filed on 2/15/19, six months after the complaint was served. (Vasquez Dec. ¶ 7.)

However, the primary factor in determining wehther the right to arbitrate was waived is prejudice. (*St. Agnes Med. Ctr. v. PacifiCare of Calif.* (2003) 31 Cal.4th 1187, 1203.) Prejudice sufficient for waiver will be found where instead of seeking to compel arbitration, a party proceeds with extensive discovery that is unavailable in arbitration proceedings. (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 212–216 [discovery included 2–day videotaped deposition of opposing party]; see also *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1364 [extensive discovery requests forcing plaintiffs to reveal case]; *Guess?, Inc. v. Sup.Ct.* (2000) 79 Cal.App.4th 553, 555, 558 fn. 1 ["You cannot have your cake and eat it too"].)

As to the stage of litigation consideration, short of a judgment on the merits, there is no fixed stage in a lawsuit beyond which further litigation waives the right to arbitrate. Rather, the court views the litigation as a whole in determining whether the parties' conduct is inconsistent with a desire to arbitrate. (*McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1980) 105 Cal.App.3d 946, 951 fn. 2.) A defendant's delay of several months after being served with the complaint was not so unreasonably long as to waive its right to compel arbitration where no prejudice to plaintiff resulted from the delay. (*New Linen Supply v. Eastern Environmental Controls, Inc.* (1979) 96 Cal.App.3d 810, 815; see *Lake Communications, Inc. v. ICC Corp.* (9th Cir. 1984) 738 F.2d 1473, 1477 [no waiver despite delay of more than a year after complaint filed and "limited" discovery (overruled on other grounds in *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.* (1985) 473 U.S. 614, 632–635).)

Here we have a delay of six months, discovery propounded by defendant responded to by plaintiff, failure to plead arbitration as an affirmative defense in the answer, and no evidence or argument of resulting prejudice.

These facts are not sufficient to find that the right to arbitrate has been waived. The delay is not that long. The discovery would only be prejudiced if it isn't available in arbitration. As the reply points out, the Arbitration Agreement (Petition to Compel Exh. A), states that both parties will be allowed to conduct civil discovery. Plaintiff has not shown that the discovery conducted would not be available in the arbitration forum. Not pleading arbitration as an affirmative defense is an act inconsistent with the right to arbitrate (*Guess?, Inc. v. Sup.Ct.* (2000) 79 Cal.App.4th 553, 555), but that fact alone is not sufficient to constitute waiver. And most significantly, plaintiff makes no showing or even argument (other than an unsupported conclusion) that she has been prejudiced.

The court finds no waiver.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH **on 4/30/2019 .**
(Judge's initials) (Date)

Tentative Rulings for Department 502

(19) **Tentative Ruling**

Re: ***Leon v. Irigoyen Farms Inc.***
Fresno Superior Court Case No. 17CECG03708

Hearing Date: May 1, 2019 (Dept. 502)

Motion: By plaintiff for class certification and preliminary approval of class settlement

Tentative Ruling:

To deem the matter complex. To deny without prejudice.

Explanation:

1. Complex Designation

Plaintiff has already designated this as a complex case. Defendant did not file a complex counter-designation, as permitted by California Rules of Court, Rule 3.402. Both sides have already paid the complex case fees. The Court finds that this matter meets the definition of "complex" under California Rules of Court, Rule 3.400(b)(1).

2. Class Certification

a. Standards

An agreement of the parties is not sufficient to establish a class for settlement purposes. There must be an independent assessment by a neutral court of evidence showing that a class action is proper. *Luckey v. Superior Court* (2014) 228 Cal. App. 4th 81 (*rev. denied*). See also Newberg, Newberg on Class Actions (T.R. Westlaw, 2017) Section 7:3: "The parties' representation of an uncontested motion for class certification does not relieve the Court of the duty of determining whether certification is appropriate."

The case so requiring is *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620 ("*Amchem*"): "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [citation omitted] for the proposal is that there will be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context."

> "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the community of interest requirement embodies

three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."

In re Tobacco II Cases (2009) 46 Cal. 4th 298, 313.

Plaintiff bears the burden of establishing the propriety of class treatment with admissible evidence. *Richmond v. Dart Industries, Inc*. (1981) 29 Cal. 3d 462, 470; *Lockhead Martin Corp. v. Superior Court* (2003) 29 Cal. 4th 1096, 1106; *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal. App. 4th 133, 144.

b. Numerosity and Ascertainability

Lawyers cannot testify for their clients or authenticate purported documents of the client. Brown & Weil, Civil Procedure Before Trial (TRG, 2008), § 10:115 - 10:116; *Norcal Mutual Ins. Co. v. Newton* (2000) 84 Cal. App. 4th 64, 72, fnt. 6; *Cullincini v. Deming* (1975) 53 Cal. App. 3d 908, 914; *Maltby v. Shook* (1955) 131 Cal. App. 2d 349, 351-352. *Rodriguez v. County of LA* (1985) 171 Cal. App. 3d 171, 175. Here, we have plaintiff's counsel purporting to testify as to what defendant knows.

That means there is no admissible evidence of the number of persons in the class. Neither plaintiff nor his attorneys have personal knowledge of the number of employees fitting the class description. Only defendant would know that, and defendant is the one that must testify, either by providing a declaration, or through a verified discovery response.

"Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible." *Sevidal v. Target Corp.* (2010) 189 Cal. App. 4th 905, 918 (internal quotations omitted). "Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary." *Nicodemus v. St. Francis Mem. Hosp.* (2016) 3 Cal. App. 5th 1200, 1212. While it seems likely that defendant can ascertain the employees at issue, and it is defendant that need so state, under oath.

c. Community of Interest

i. Class Representatives with Typical Claims

"The focus of the typicality requirement entails inquiry as to whether the plaintiff's individual circumstances are markedly different or whether the legal theory upon which the claims are based differ from that upon which the claims of the other class members will be based." *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46.

The class representative states he was a field harvester and packer during 2017, which falls during the class period of October 27, 2013 through the date of preliminary approval. However, the class has been expanded from that listed in the pleading to include every type of non-exempt worker, whether a field harvester/packer, a

secretary, mechanic, or post-harvest packer. Workers like the named plaintiff are governed by Title 8, California Code of Regulations, section 11140. Subsection 2(D)(4) notes that field packing is included in the work covered by that order. Those who engage in post-harvest packing activities off the field are covered by a different Wage Order, Title 8, California Code of Regulations, section 11180.

The two fields of endeavor have substantially different requirements in terms of days and hours of work and overtime. Field pickers/packers do not get overtime until they work at least 10 hours in a day or more than 6 days a week. Post-harvest packing house workers (preparing for distribution) get overtime after 8 hours in a day or 40 hours in a week. Field pickers/packers have different minimum wages based on the size of their employers. Packing house workers do not. When it comes to secretarial or janitorial workers, no commonality is shown, and plaintiff's claim is not typical of those who are not field workers. They have different working hours and overtime standards.

ii. Predominant Questions of Fact and Law

"As a general rule, if defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1022. "California courts consider pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." *Jaimez v. DAIOHS USA* (2010) 181 Cal. App. 4th 1286, 1298.

The expansion of the class from field pickers/packer to everyone employed on a non-exempt basis with the company renders it difficult to show that common questions of fact and law predominate. The named plaintiff worked only a few months during 2017, and his experience shows no basis to find all workers suffered the same injuries he contends he suffered.

In *Pena v. Taylor Farms Pacific, Inc.* (E.D. Cal. 2015) 305 F.R.D. 197, the Court refused to certify a class for failure to provide sufficient evidence of any policy of placing incorrect information on wage statements. The only evidence was a single wage statement from a class representative. The plaintiffs "have not shown the solitary stub makes the same omission as every paycheck delivered to every non-exempt hourly employee, regardless of position or department, over the relevant multi-year time period. They have not even shown all class members received paystubs. Because the plaintiffs bear the burden to show common issues exist and predominate, certification of the wage statement subclass is denied." (*Id.* at 224.)

Here, plaintiff has not provided even his own wage statements. There is nothing from defendant discussing its wage statement or overtime policies, or the types of workers that would be included in this expansive class.

In wage and hour class actions or PAGA class claims,[2] the distinctive feature that permits class certification is that the employees have the same job title or perform similar jobs, and the employer treats all in that discrete group in the same allegedly unlawful fashion.

In *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 482, Judge Wanger gave preliminary approval of a settlement class "comprised of all individuals who have been employed by Coast in California as non-exempt roofing workers . . ." (*Id*. at 486.) In *Ogbuehl v. Comcast* (E.D. Cal. 2014) 303 F.R.D. 337, 348: the Court certified a settlement class of those "who held positions as Virtual Customer Account Executives, and were not paid a severance payment that was offered as a result of the California Call Center Closure." Preliminary approval was given in *Nen Thio v. Genji, LLC* (N.D. Cal. 2014) 14 F. Supp. 3d 1324, 1330: for settlement class limited to those employed as "Sushi Team Leader or Sushi." In *Monterrubio v. Best Buy Stores* (2013) 291 F.R.D. 443, the Court certified a settlement class limited to "retail store positions of Supervisor or Manager."

The Court denied a motion for preliminary settlement in *Lusby v. Gamestop Inc*. (N.D Cal. 2013) 297 F.R.D. 400, 405 where the class proposed was composed of: "All persons who are and/or were employed as overtime-eligible employees by GameStop, in one or more of GameStop's California retail stores, between June 21, 2010 and June 30, 2012." "Because it is highly unlikely that all positions and job duties at Defendants' retail stores are identical, and that all Class Members would be seeking the same relief, the Court is not persuaded that there are no dissimilarities in the proposed class that could 'impede the generation of common answers apt to drive the resolution of the litigation.' " (*Id*. at 410.) In *Adoma v. University of Phoenix* (E.D. Cal. 2012) 913 F. Supp. 2d 964, 971, the settlement class approved for a PAGA settlement consisted exclusively of "enrollment counselors."

It is possible that plaintiff can show a policy or procedure which raises an inference of the wrongs claimed throughout the class period. Counsel states he was given a sampling of 10% of the employees. Unless the data was a statistically valid sampling done according to scientific methods and verified by defendant, and unless the extrapolations were done in a scientifically valid manner by a qualified person, conclusions drawn therefrom are without value.

There is no explanation of the data provided or of the extrapolation methods used, or by whom they were employed. *Apple Inc. v. Superior Court* (2018) 19 Cal. App. 5th 1101 held that *Sargon Enterprises, Inc. v. USC* (2015) 55 Cal. 4th 747 applies when a trial court considers expert opinion evidence on a motion for class certification.

Only admissible opinion can be considered, and *Sargon* sets the standards for admissibility. The court must assess the soundness of the experts' materials and methodologies. *Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App. 4th 715 discusses the use of such means of proof in a wage and hour case.

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[2] That is the Private Attorney General's Act, found at Labor Code sections 2698 et seq.

d. Adequacy

"[T]he adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669. Because there has been no prior motion work on this case, it is difficult to gage the efforts taken by counsel in discovery and investigation. No other cases where counsel has been named class counsel are listed, no contested motions for class certifications won or attempted are set forth. Counsel need provide more details on the experience of his firm in this regard.

4. Settlement

a. Legal Standards

"When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and class counsel will breach the fiduciary obligations they owe to the absent class members. As a result, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *Koby v. ARS National Services, Inc.* (9th Cir. 2017) 846 F. 3d 1071, 1079. See also *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 120:

> "[A]n informed evaluation cannot be made without an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation. It is possible that the data necessary to make such an evaluation in this case was given to the trial court during informal discussions with counsel, but no such information appears in the record. Therefore, we must vacate the order approving the settlement and remand the matter to permit the trial court to reconsider the fairness and adequacy of the settlement in light of such additional information as the parties may present concerning the value of the class members' claims should they prevail in the litigation and the likelihood of their so prevailing."
>
> "[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement . . . The courts are supposed to be the guardians of the class."
>
> (*Id*. at 129.)

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the . . . court must be sufficiently developed." (*Id*. at 130.)

"Factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." (*Id*. at 128.)

What the Court need be leery of is a situation where "there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see." (*Id.* at 129.)

b. Settlement Here Not Supported.

The first defect is that the settlement agreement is not attached to counsel's declaration. It does appear that the proposed notice to class is attached to the moving papers. There is a statement in the moving papers that defendant's taxes will be paid out of the employees' settlement, and that defendant will recover any money not awarded to class counsel or the named class representative (see footnote on page 2 of counsel's declaration). No mention is made of what will happen with the administrator's fees. Thus the only guaranteed payment by defendant is the $78,000, for what the class notice states is 286 weeks covered in the class period. There is no estimate given for the maximum probable value of the claims in the complaint or for the class for which certification is now sought. Thus it is not possible to determine if the $78,000 is a fair and reasonable figure for compromise of those claims.

Some of the class would have waiting penalties claims, but they are to be paid according to the same formula as those who do not. Others would be due overtime after 8 hours in a day, but are also paid via the same formula as those who did not qualify for overtime until they had worked for 10 hours. There is no adequate explanation given for treating all class members equally despite their differing claims.

There is little analysis about why the claims are being settled, other than that the data did not show a lot of overtime. If the overtime was not recorded, the "data" would not show it, and a survey may be needed. There is no description from the named plaintiff on how he recorded his time, if he did it individually, if someone else did it for him, if he used a time card, etc. There is no showing that the same procedures were followed for all non-exempt employees. There is nothing to show how many hours might have been unpaid, or for how many years, or in what jobs. Counsel may have seen some information he feels is sufficient, but the Court also has to be apprised of the losses and the basis for them.

Often in these cases an expert is used to 1) set up a sampling and tell defendant what must be produced and how, and 2) use that sampling to then determine figures for losses. That will be much harder here since there appear to be different kinds of workers with different wage orders setting forth different overtime standards, but not impossible.

There is insufficient evidence to evaluate the settlement. A claim by claim estimate of maximum potential damages is necessary, with an underlying evidentiary foundation for the estimate.

5. Other Problems

a. Defendant's Taxes

A settlement fund for class members cannot be used to pay defendant's taxes, and the uncertainty of those taxes renders the fund's value to the class members uncertain as well. Defendant need be directly responsible for its own taxes, and may not increase the administration costs by having the settlement administrator assist it in that regard.

b. Scope of Release

The class notice refers to an "FAC," which usually means First Amended Complaint. There is none in the Court's file for this matter. The first page states that "all claims arising from or related to the lawsuit and/or the allegations of the Complaint" are being released, which is improper. It also says that "a settlement will provide up to $150,000 to pay claims for alleged California Labor Code violations . . ." but that is not true. Counsel has admitted $78,000 or so is available to pay those claims, the rest goes to counsel or back to defendant.

"The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *In re American Exp. Financial Advisors Securities Litigation* (2nd Cir. 2011) 672 F. 3d 113. "The Court may approve a settlement which releases claims not specifically alleged in the complaint as long as they are based on the same factual predicate as those claims litigated and contemplated by the settlement." *Strube v. Am. Equity Inv. Life Ins. Co.* (M.D. Fla. 2005) 226 F.R.D. 688, 700. The release here need be limited to such claims as were or could have been raised based on the "identical factual predicate" of the operative complaint.

The release includes insurers, co-insurers, administrators, attorneys, and personal or legal representatives. If the defendant experiences financial problems, an insurer may be the one that ends up paying the settlement. *Weakly-Hoyt v. Foster* (5th Dist. 2014) 230 Cal. App. 4th 928. In *Walmart Stores Inc. v. Visa U.S.A., Inc.* (2nd Cir. 2005) 396 F. 3d 96, 109 third party banks were released because "the banks not only contributed to the Settlement, but virtually all the relief comes from them."

It referenced *In re Holocaust Victim Assets* Litigation (E.D.N.Y. 2000) 105 F. Supp. 2d 139, 160, where there were a number of objections to including insurers in the release. The objections were resolved by $100,000,000 contribution ($50,000,000 by the insurers themselves) to a fund set aside to pay insurance claims.

In *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F. 2d 1268, the settlement (and therefore the release) included claims against the State of Washington by its own citizens, which could not be brought in a federal district court. Such claims were in fact pending in a state court class action. The State contributed $10,000,000 to the settlement. (*Id*. at 1292.) "[C]ourts recognize that it is appropriate for a class action settlement to include a limited release of a non-party, such as Lloyd's, where that non-party has contributed substantially to making the settlement possible." *In re Lloyd's American Trust Fund Litigation* (S.D.N.Y. 2002) 2002 WL 31663577, also referenced in the *Walmart* matter.

There is no basis shown to release insurers, co-insurers, re-insurers, administrators, attorneys, or personal or legal representatives.

c. FLSA Claims

"Rule 23 actions are fundamentally different from collective actions under the FLSA." *Genesis Healthcare Corp. V. Symczyk* (2013) 133 S. Ct. 1523, 1529. FLSA actions are not class actions under either federal or California state law. *Haro v. City of Rosemead* (2009) 174 Cal. App. 4th 1067.

"However, the terms of the settlement, including the release of FLSA claims despite no such claims having been pled at the time of settlement, reflects that Thompson and class counsel may have favored their own interests at the expense of the class members to achieve the settlement. Moreover, the complete failure to recognize this action as hybrid action raises questions as to counsel's understanding of the procedural rules applicable to the FLSA claims it proposes that the class release without compensation." *Thompson v. COSTCO* (S.D. Cal., 2017) 2017 WL 697895.

The Court there found that it could not certify an FLSA collective action because such was not pled and there was no request for such certification. It also found it was improper to require class members to release their FLSA claims in order to be compensated for their state law claims.

Courts within the 9th Circuit have found that Rule 23 class actions are incompatible with FLSA collective actions, but the 9th Circuit has thus far refused to reconcile the split of authority. *Pitts v. Terrible Herbst, Inc.* (9th Cir. 2011) 653 F. 3d 1081, 1093. The Eastern District of California requires a separate consent form. See *Millan v. Cascade Water Services, Inc.* (E.D. Cal. 2015) 310 F.R.D. 593, *Maciel v. Bar 20 Dairy LLC* (E.D. Cal. 2018) 2018 WL 5291969.

A consent to join and release of an FLSA claim require some formality. For example, a statement on the back of a check that one joins a collective FLSA action by cashing the check is insufficient to release such a claim. *Beauford v. ActionLink, LLC* (8th Cir. 2015) 781 F. 3d 396. See also 29 U.S.C. section 216(b), which states (in part): "No

employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." That case held that a release was ineffective unless it described the damages to which the employee might be entitled under the FLSA (such as liquidated damages equal to the unpaid wages or overtime), and that the releasing party is waiving such claims. Another attempt to use endorsement of a check was rejected by Judge Mueller of the Eastern District in *Smothers v. Northstar Alarm Services, LLC* (E.D. Cal. 2019) 2019 WL 280294, *10.

If the parties wish to settle a potential FLSA claim, they must do so in a fashion that adheres to the law concerning same.

d. Opt-Out Provision

This demands that the person wishing to out use particular quoted language, and that they provide their telephone number and part of a Social Security number. People are leery of providing personal telephone and social security information in response to a mass form letter mailing. Those sort of demands are likely to dissuade members from opting out if they wish to, and are unnecessary. The notice to class can use a form which has an identifying number on it and requires only a signature and mailing it back.

e. Dispute Provision

The dispute provision is found on page 8. It requires the administrator to handle disputes, likely at an extra cost. Here the costs estimated for the administrator are $14,500, which is rather high. Class counsel should be the contact for any dispute of weeks worked, and he/she should hash it out with opposing counsel. Spending thousands on an administrator to handle issues that the attorneys should handle for their clients subtracts money from that due to the class members themselves.

The notice to class should state the anticipated payout to the individual class member receiving it as well.

f. Objections

The objection procedure is found on page 9. It requires that objections be served on the claim administrator. They need to be filed with the Court, and served on the attorneys. Again, using the claim administrator costs more money, and there is no need.

g. Reference to Court File

The notice to class tells class members that they can come to Fresno to look at the file, and refers them to the main court website as well. It would be far easier for class members to proceed directly to the Odyssey search link, with instructions that they insert the case number. That link is:

https://publicportal.fresno.courts.ca.gov/FRESNOPORTAL/Home/Dashboard/29

h. Questions

The class notice advises class members to call the administrator with questions. They should be calling class counsel; that is part of what they are being paid for – assisting their clients.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/29/19.
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Allyson Charles v. Jacqueline Gomez***
Case No. 18CECG04428

Hearing Date: May 1, 2019 (Dept. 502)

Motion: Defendant Jacqueline Gomez's Motion to Strike

Tentative Ruling:

To deny.

Explanation:

A motion to strike portions of a complaint must be filed within the time the defendant is given by law to respond to the complaint. (Code Civ. Proc., § 435, subd. (b)(1).) A defendant has 30 days after service is complete to file a response to the complaint. (Code Civ. Proc., § 412.20, subd. (a)(3).)

This motion is untimely. Defendant Gomez was personally served with the summons and complaint on January 4, 2019. Thirty (30) days from January 4, 2019 is February 3, 2019. Since February 3, 2019 fell on a Sunday, defendant had until the following business day or February 4, 2019, to file her response to the complaint. Defendant did not file this motion until February 28, 2019 — 24 days after the time to file a response to the complaint had expired. Paragraph 4 and Exhibit A to the declaration of defendant's attorney establishes that defendant did not even begin the required meet and confer process until February 8, 2019. This is four days after the time to file a response to the complaint had expired.

Defendant's arguments to the contrary are unavailing. No authority is cited supporting defendant's claim that prejudice is required before the motion can be deemed untimely. The date of counsel's retention is irrelevant to the issue of timeliness. Finally, defendant's time to file the motion was never extended. Counsel did file a declaration on February 8, 2019. However, it was not in conformity with Code of Civil Procedure section 435.5. In relevant part, Code of Civil Procedure section 435.5 states:

> "If the parties are unable to meet and confer at least five days before the date the motion to strike must be filed, the moving party shall be granted an automatic 30-day extension of time within which to file a motion to strike, by filing and serving, **on or before the date a motion to strike must be filed**, a declaration stating under penalty of perjury that a good faith attempt to meet and confer was made and explaining the reasons why the parties could not meet and confer." (Code Civ. Proc., § 435.5 emphasis added.)

Counsel's declaration was untimely and did not extend the time to file this motion to strike.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/19/19.
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Bond v. Velasquez.***

Case No. 18CECG03877

Hearing Date: May 1, 2019 (Dept. 502)

Motion: By Defendants to Quash in Part Subpoena to JP Morgan Chase
By Defendants to Quash in Part Subpoena to BBVA Compass Bank

Tentative Ruling:

To grant without prejudice to Plaintiffs' right to either re-subpoena the records after depositions of the deponents' custodians of records or re-subpoena the records using a more targeted approach to obtaining records which are discoverable in this proceeding.

Explanation:

A motion to quash or modify a subpoena may be made on the grounds that the matters sought to be discovered are privileged, protected, or otherwise beyond the scope of discovery. (Code Civ. Proc. §2017.010.) A motion may also be brought on the grounds that the discovery sought is unreasonable, or oppressive or is an unreasonable violation of a right to privacy. (Code Civ.Proc. §1987.1, subd.(a).)

Defendants seek to quash, in part, two business records subpoenas on the grounds that they seek financial information protected by the right to privacy. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 552.)

> "The party asserting the right must establish a legally protected privacy interest, an objectively reasonable expectation of privacy in the given circumstances, and a threatened intrusion that is serious. The party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy. A court must then balance these competing considerations." (*Id.* (internal quotations omitted).)

Here, Defendants have identified their privacy interest in their financial information as a valid and protected privacy interest in which they have an objectively reasonable expectation of privacy, and the subpoenas would be an intrusion into that right particularly given the breadth of information sought.

Though Plaintiffs have identified legitimate and countervailing interests in the information in that *some* of the documents sought *may be* relevant to their claims

founded on misappropriation, it appears to the court that, particularly given the breadth of the records identified in the subpoenas, Plaintiffs can discover the information sought by less intrusive means, at least initially. Accordingly, the motions will be granted. The court would prefer Plaintiffs proceed initially by way of depositions of the custodian of records for the deponents to attempt to establish which, if any, of the financial records are discoverable given the allegations of their complaint. If such depositions establish any of the records are discoverable Plaintiffs may re-subpoena them. In the alternative, Plaintiffs may re-subpoena the records using more specific requests which are targeted to the claims raised in this action. This order is also without prejudice to Defendants' ability to move to quash any future subpoenas for their financial records.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/29/19.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(2)

Tentative Ruling

Re: ***Silva v. Tess***
Superior Court Case No. 16CECG03921

Hearing Date: May 1, 2019 (Dept. 503)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To deny without prejudice. Petitioner must file a new petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The customary reasonable attorney's fees in a petition to compromise the minor's claim are 25 percent of the net settlement amount (gross settlement amount minus costs). In the current petition, the attorney seeks 25 percent of the gross settlement amount. There is nothing about this case that warrants this increased fee amount.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 4/25/19.
(Judge's initials) (Date)

(29) **Tentative Ruling**

Re: ***Roddy v. Aryan, M.D., et al.***
Superior Court Case No. 18CECG00132

Hearing Date: May 1, 2019 (Dept. 503)

Motion: Defendant Saint Agnes Medical Center's motion for summary judgment

Tentative Ruling:

To grant Defendant Saint Agnes Medical Center's motion for summary judgment. The moving party is directed to submit to this Court, within five days of service of the minute order, a proposed judgment consistent with this summary judgment ruling.

Explanation:

A trial court shall grant summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc. §437c(c); *Schacter v. Citigroup* (2009) 47 Cal.4th 610, 618.) The moving party bears the initial burden of production to make a prima facie showing of the "nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) "[A]ll a defendant needs to do is to show that the plaintiff cannot establish at least one element of the cause of action." (*Id*. at p. 853.) Where the defendant meets this initial burden, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact by producing admissible evidence. (Code Civ. Proc. §437(c)(p)(2); *Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1379.) In reviewing a grant of summary judgment, an appellate court accepts as undisputed facts those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. (*A-H Plating, Inc. v. American National Fire Ins. Co*. (1997) 57 Cal.App.4th 427, 434; see Code Civ. Proc. §437c(c).)

When a defendant in a medical malpractice action moves for summary judgment and supports the motion with expert declarations that the defendant's conduct fell within the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123; *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607; *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985; see Code Civ. Proc. § 437c(c).) Summary judgment should not be granted where the defendant provides an unopposed expert declaration which is conclusory, i.e., simply states the opinion that no malpractice has occurred, and does not set forth the basis on which the opinion is based. (*Powell*, *supra*, 151 Cal.App.4th at p. 123.)

In the instant case, Defendant Saint Agnes Medical Center ("Saint Agnes") submits the declaration of Rita Restrepo, R.N. Ms. Restrepo's declaration sets forth the basis on which her opinion is based, reflects a sufficient analysis of the treatment

received by Plaintiff while at Defendant Saint Agnes's facility, and concludes that the treatment was within the standard of care at all times.

Defendant Saint Agnes's burden having been met, the burden shifts to Plaintiff to make a prima facie showing of the existence of a triable issue of material fact. Plaintiff does not oppose the motion, and thus does not meet his burden. Accordingly, Defendant Saint Agnes's motion for summary judgment is granted.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 4/25/19.
(Judge's initials) (Date)
)

(20) **Tentative Ruling**

Re: ***Borceguin v. Brown Construction, Inc.***
Superior Court Case No. 16CECG03602

Hearing Date: May 1, 2019 (Dept. 503)

Motion: Brown Construction, Inc.'s Motion for Summary Judgment/ Adjudication

Tentative Ruling:

To deny. (Code Civ. Proc. § 437c(c), (f).)

Explanation:

Plaintiff alleges a single cause of action for general negligence for injuries sustained while working for Sparky Electric, a subcontractor to defendant Brown Construction ("Brown"), the general contractor of a construction project.

The motion is opposed by plaintiff, as well as by George A Bics Plumbing, Inc. ("Bics"). Bics' opposition will not be considered due to the untimely service of the papers. (See Code Civ. Proc. §§ 437c(b)(2), 1005(c); Sande Dec. ¶ 2.)

Regarding evidentiary objections, the court sustains plaintiff's objection no. 2, and overrules no. 1. Objections nos. 3-12 are also overruled, as evidentiary objections can only be made to the underlying evidence, not the facts as characterized in the separate statement. (See Cal. Rules of Court, rules 3.1352, 3.1354.) The facts are largely undisputed, until it comes to those that truly matter for purposes of this motion.

The motion is brought pursuant to *Privette v. Superior Court* (1993) 5 Cal.4th 689, and its progeny. Generally, in the context of an employee of an independent contractor's action against the hirer, as a matter of public policy, the availability of worker's compensation insurance to compensate the injured employee precludes an action against the hirer. (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253.)

The parties extensively brief *Privette* and its progeny. The court will not repeat all the arguments here. The key issue is as follows: As the general contractor, Brown has no liability to plaintiff, the employee of a subcontractor, unless Brown "affirmatively contributed to the employee's injuries." (*Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198, 202.) That includes active interference with or direction of the independent contractor's employees as to the manner and means of performing their work. (*McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 798.)

The motion must be denied because it is lacking in admissible evidence on these key facts. Undisputed Material Fact ("UMF") Nos. 12-21, the material facts relevant to these issues, are not supported by admissible evidence.

UMF No. 12 posits that it is not Brown's *custom or practice* to supervise subcontractors, control the means or methods by which they perform their work, provide them with materials, interfere with the means or methods by which subcontractors perform their work, or promise to undertake particular measures to ensure the safety of subcontractors. This is what Kathryn McGuire, Brown's Vice President of Operations, states in paragraph 4 of her declaration. While the court overrules the objection to this paragraph, as the Vice President of Operations would appear competent to testify as to the contractor's customs and practices, it is of little value in assessing this motion because it says nothing of what was done at this construction site, in particular.

UMF Nos. 13-21 all address the control exercised by Brown at the construction site, stated in terms of ultimate facts (e.g., UMF No. 14, Brown did not control the methods or means Borceguin used to perform his work at the subject project.) All nine of these UMF Nos. cite to the same evidence: "Borceguin Dep., pp. 13:4-9, 16:1-5, 47:5-48:10, 50:14-24, Exh. D; Zepeda Dep., pp. 10:24-11:6. 11:17-12:13, 12:21-13:10, Exh. E; McGuire Dec., ¶ 5."

The problem, as pointed out by plaintiff in the opposition, is that none of these items of evidence support or establish any of these "material facts" as characterized by Brown. (See Responses to UMF Nos. 13-21.) It is telling that the reply does not contend otherwise. Moreover, the Zepeda deposition is not included in Brown's evidence. (See Frankenberger Dec.)

In *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1275–1276, where the court addressed what evidence in that case was sufficient to shift the burden to the plaintiff on a summary judgment motion, the court stated:

> It was undisputed that Summit View was the general contractor and Madden was an employee of the subcontractor at the Welsh construction site. It was undisputed that Summit View had no control over the methods and supplied none of the materials that Madden's employer used for its electrical work at the site. Consistent with the *Privette-Toland* line of cases, these facts were sufficient to shift the burden to Madden to produce evidence that Summit View nonetheless retained control over safety conditions and practices at the site, and that it contributed by its affirmative conduct to an unsafe condition or practice that caused Madden's injury.

Here, the moving papers simply submit no admissible evidence showing that Brown had no control over the methods; that it supplied none of the materials used by plaintiff; and that it did not otherwise affirmatively contribute to the condition that causes plaintiff's injury. Brown fails to satisfy its burden as the moving party. The burden does not shift to plaintiff to produce evidence raising a triable issue of fact.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 4/26/19.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Lambetecchio v. Lambetecchio***
Superior Court Case No. 16CECG02319

Hearing Date: May 1, 2019 (Dept. 503)

Motion: Respondent Catherine Lambetecchio's Motion to Transfer and Bifurcate

Tentative Ruling:

To grant and transfer the action to the Probate Department of this Court. (Prob. Code § 17000.)

Explanation:

Petitioner in this action challenges the distribution of assets in decedent's trust, and seeks to rescind and nullify amendments and codicils and remove Respondent as trustee. In addition to the claims pertaining to the internal affairs of the trust, the petition asserts a cause of action for financial elder abuse.

The Probate Court has exclusive jurisdiction over proceedings concerning the internal affairs of trusts. (Prob. Code § 17000, subd. (a).) Under Probate Code section 7000, subdivision (b), the Probate Court has concurrent jurisdiction over: "(1) Actions and proceedings to determine the existence of trusts. (2) Actions and proceedings by or against creditors or debtors of trusts. (3) Other actions and proceedings involving trustees and third persons." Accordingly, "by statute, the probate department has exclusive jurisdiction of the . . . section 17200 petition, but only concurrent jurisdiction of the civil complaint. ([Prob. Code] § 17000; *David v. Hermann* (2005) 129 Cal.App.4th 672, 683, 28 Cal.Rptr.3d 622.)" (*Estate of Bowles* (2008) 169 Cal.App.4th 684, 695, emphasis added.)

The 1990 Law Revision Commission Comments to Probate Code section 17000 make clear that "[i]t is intended that the department of the superior court that customarily deals with probate matters will exercise the exclusive jurisdiction relating to internal trust affairs provided by subdivision (a)." (Emphasis added; see also *Harnedy v. Whitty* (2003) 110 Cal.App.4th 1333, 1344-1345 ["Probate Code section 17000, subdivision (a), gives the probate department of the relevant superior court exclusive jurisdiction of proceedings concerning the internal affairs of trusts." (Internal quotations and citation omitted.)].)

The Probate Department has concurrent jurisdiction over the civil cause of action for elder abuse, but it has exclusive jurisdiction over the claims pertaining to the trust. Accordingly, the motion to transfer is granted.

Petitioner notes that Respondent has participated in discovery by taking depositions, propounding substantial discovery and responding to discovery. (Dowd Dec. ¶ 2.) Citing *Harnedy v. Whitty*, *supra*, 110 Cal.App.4th at 1344, Petitioner contends

that, by not raising this issue before filing a response and by participating fully in the discovery conducted to date, Respondent has waived any such claim.

However, *Harnedy* does not so hold. Rather, in that case, waiver applied where the respondent did not raise any issue relating to the trial court's jurisdiction prior to appeal, and instead participated fully in the pretrial and trial of the case. (*Id.* at p. 1345.) Moreover, the court held that "the allegations of the complaint do not relate to the internal affairs of the trust as that term is used in Probate Code, section 17000, subdivision (a)." (*Ibid.*) That obviously is not the case here. Petitioner does not even contend as much. Petitioner has not shown that principles of waiver apply in the instant case.

The moving papers also request that the court bifurcate the internal trust affairs dispute from the tort claim. This department will not decide that issue at the present time. The Probate Department, or the judge to whom the matter is assigned for trial, can determine the order in which the claims are tried.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 4/29/19.
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Sandstone Marketing, Inc. v. Felger, et al.***
Superior Court Case No. 12CECG01892

Hearing Date: May 1, 2019 (Dept. 503)

Motion: Order to Show Cause re Sale of Real Property

Tentative Ruling:

To grant. Judgment creditor Sandstone Melon Company, Inc., f/k/a Sandstone Marketing, Inc., may proceed with the sale of the real property commonly known as 40749 Silvertip Lane, Shaver Lake, CA 93664 to satisfy its judgment against defendants Warren Felger and Forrest Felger.

Explanation:

If the records of the county tax assessor indicate that there is no current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the burden of proof that the dwelling is a homestead is on the person who claims that the dwelling is a homestead. (Code Civ. Proc., §704.780, subd. (a)(1).) There is no such exemption in this case; thus, the burden of proof is on Forrest Felger to show that the property is a homestead. He has not carried this burden.

Defendants' opposition is based on a single premise: that the lawsuit is not being prosecuted by the correct entity and that the law bars the amendment of the complaint to change the name of the plaintiff. This premise is without merit.

"Generally, a change of corporate name does not make a new corporation, but only gives the corporation a new name. A change in the name of a corporation does not constitute a reorganization of the corporation, does not destroy the identity of the corporation, nor in any way affects the corporation's rights and obligations. The change of a corporation's name is not a change of its identity and has no effect on the corporation's property, rights or liabilities, although it may have the effect of inducing additional averments in pleading in particular cases for the purpose of showing the identity of the corporation. [¶] . . . The corporation continues, as before, responsible in its new name for all debts or other liabilities which it had previously contracted or incurred. . . . If the change of name takes place pending a suit against the corporation, it has no effect on the rights of plaintiff." (18 C.J.S. (2007) Corporations § 140, p. 439, fns. omitted; *Mutual Bldg. & Loan Assn. v. Corum* (1934) 220 Cal. 282, 292 ["a change in name does not affect the identity of a corporation"].)

"A mere change in the name of a corporation generally does not destroy the identity of the corporation, nor in any way affect its rights and liabilities. A change of name by a corporation has no more effect upon the identity of the corporation than a change of name by a natural person has upon the identity of such person. It is the same corporation with a different name. The nature and character of the corporation

do not change, nor do the rights and liabilities of its shareholders. [¶] A corporation that has changed its name may act and conduct its business under the new name. If a corporation is identified by its old name, the misnomer does not render the transaction invalid. . . . A court may take judicial notice of a change in the name of a corporation; otherwise the identity of the corporation must be proven by sufficient evidence." (6 Fletcher Cyclopedia of the Law of Private Corporations (2005) § 2456, pp. 180-183, fns. omitted.)

Here, it is clear that Sandstone Marketing, Inc. merely changed its name to Sandstone Melon Company, Inc., as allowed by law. This name change effected no change in rights to the judgment obtained in the name of Sandstone Marketing, Inc. It is not cause to stop the enforcement efforts. Because defendants' sole objections to the order to show cause are based on the name change, there is no cause not to issue the order to sell the property.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 4/29/19.
(Judge's initials) (Date)